

FEDERAL COURT.

Miss G. Ambavagar for the appellant.

K.L. Rekhray for the respondent.

Cur. Adv. Vult.

Suffian L.P.: This is an application for extension of time to file a record of appeal made under rule 73 of the Civil Appeals (Transitional) Rules, 1963.

The judgment appealed from was delivered on January 29, 1980. Notice of appeal was filed within time on February 14. On March 17, the Chief Registrar wrote to the appellants' solicitors saying that the appeal record must be filed on or before April 1.

They did not do so because by then they had not received the learned judge's notes of evidence and grounds of judgment.

They could have followed the advice contained in Practice Note No. 2 of 1970 [1970] 2 M.L.J. 1vi and before April 1 sought the respondents' consent to enlargement of time without application to the court, and Mr. Rekhray for the respondents told me that if that had been done, in the circumstances his clients would have had no choice but to consent.

The learned judge's notes of evidence and grounds were supplied to the appellants only on April 3 and they are now ready to file their record of appeal.

Mr. Rekhray submitted nevertheless that this application should not be allowed — because among other things the appellants did not file this application until April 18, 1980, 18 days after the last day for filing the appeal record, and, secondly, the appellants gave no reason in their affidavit why time should be extended.

Miss Ambavagar, counsel for the appellants, stated from the Bar that between April 3 and 5, after receiving the notes of evidence and the grounds of judgment, she rang up Mr. Rekhray to ask whether the respondents would agree to extend time, and she was told "No". Hence this application to the court.

Having considered the cases cited by Mr. Rekhray, namely: *Ratnam v. Cumarasamy & Anor.*;⁽¹⁾ *Chong Kueng Ying & Ors. v. Louis Lavagna*;⁽²⁾ and *Gan Hay Chong v. Siow Kian Yuh & Anor.*;⁽³⁾ I am of the opinion that this application should be granted, and I therefore grant it, the record to be filed within a week from today and the appellants to pay costs of this application.

In my view, none of the cases cited precludes me from exercising my discretion in favour of the appellants, this being an application not under rule 13 but under rule 73, which allows an application such as this to be made even after the expiration of the time within which the record should have been filed. Delay by the learned trial judge in supplying the necessary papers is in my view a good ground for allowing the application, and there is no question here of any mistake by the appellants' solicitors. Failure to comply with Practice Note 2 of 1970 is to save costs, and

A as appellants have to pay the costs of this application, the respondents should have no cause for complaint.

Application granted.

Solicitors: Ambavagar & Co.; K.L. Rekhray & Co.

B

PUBLIC PROSECUTOR v. YONG THIAM FATT

[A.Cr.J. (Harun J.) October 12, 1979]

[Kuala Lumpur — Criminal Appeal No. 29 of 1979]

C

Criminal Law and Procedure — Offence of using a vehicle without third party insurance — Whether court has discretion to make an order under s. 173A Criminal Procedure Code — Cautioned and discharged — Whether disqualification mandatory — Road Traffic Ordinance 1958, s. 74 — Criminal Procedure Code (F.M.S. Cap. 6), s. 173A.

Road traffic — Disqualification — Road Traffic Ordinance 1958, s. 74.

D

In this case the respondent had been convicted on his plea of guilty of three charges of (i) not displaying "L" plates (ii) carrying a pillion rider and (iii) using the vehicle without third party insurance. On the third charge he was "cautioned and discharged." The Public Prosecutor appealed against the sentence on the third charge.

E

Held: (1) the Magistrate in the exercise of his judicial discretion has the power to make an order under section 173A Criminal Procedure Code for a contravention of section 74 of the Road Traffic Ordinance;

(2) whether the offender is convicted or not there is no necessity for the court to order disqualification for a period of twelve months since such disqualification is automatic.

Cases referred to:-

(1) *Jayanathan v. Public Prosecutor* [1973] 2 M.L.J. 68.

(2) *Chan Tak Sang v. Public Prosecutor* [1956] M.L.J. 256.

F

[The following cases were also cited in argument: *Public Prosecutor v. Albert See* [1971] 1 M.L.J. 47; and *Public Prosecutor v. Nasir* [1972] 2 M.L.J. 39.]

CRIMINAL APPEAL.

Mah Weng Kwai (Deputy Public Prosecutor) for the appellant.

Respondent absent.

G

Cur. Adv. Vult.

Harun J.: This appeal is of some importance in that it involves a type of case which occurs daily in the Magistrates' Courts and there are nine other similar appeals pending.

H

It concerns the familiar case of the motor cyclist who faces three charges of —

(i) Not displaying 'L' plates;

(ii) Carrying a pillion rider; and

(iii) Using the vehicle without Third Party insurance.

The respondent in this case pleaded guilty to all three charges and was sentenced:

I

On the first charge to a fine of \$30 in default 6 days' imprisonment;

On the second charge to a fine of \$50 in default 10 days' imprisonment; and

On the third charge he was "cautioned and discharged".

The Public Prosecutor is concerned with the order made in respect of the third charge. The law rele-

vant to the third charge is section 74 of the Road Traffic Ordinance, 1958 which reads:

- "(1) Subject to the provisions of this Part of this Ordinance it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle unless there is in force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a security in respect of third party risks as complies with the requirements of the Part of this Ordinance.
- (2) If a person acts in contravention of this section, he shall be liable to imprisonment for a term not exceeding three months or to a fine not exceeding one thousand dollars or to both such imprisonment and fine, and a person convicted of an offence under this section shall, unless the court for special reasons to be specified in the order thinks fit to order otherwise and without prejudice to the power of the court to order a longer period of disqualification, be disqualified for holding or obtaining a driving licence under Part II of this Ordinance for a period of twelve months from the date of the conviction.
- (3) A person disqualified by virtue of a conviction under this section or of an order made thereunder for holding or obtaining a driving licence shall, for the purposes of Part II of this Ordinance, be deemed to be disqualified by virtue of a conviction under the provisions of that Part."

There are other provisions but these do not concern us here. Now subsection (2) consists of two limbs, viz.:

- (i) Liability to imprisonment or fine or both for *contravention of this section*; and
- (ii) Mandatory disqualification for holding or obtaining a driving licence by a person *convicted of an offence under this section*.

The authorities dealing with the interpretation of the words "shall be liable" were reviewed by the Federal Court in *Jayanathan v. Public Prosecutor*⁽¹⁾ and it is clear from these authorities that the court may exercise its powers under section 173A Criminal Procedure Code in respect of an offence under section 74 of the Road Traffic Ordinance. It follows in such a case (as it did in this case) that no "conviction" is recorded.

The question then will disqualification follow. The word 'conviction' appearing in the section must be taken in its technical sense, that is to say, the court must record a 'conviction' as such. On a reading of the subsection as a whole therefore it would appear that disqualification will only follow if a conviction is recorded. This is because if the legislature had intended to disqualify any person who contravenes the section whether convicted or not, there would not be any need to insert the words appearing after "fine, and" the words "a person convicted of an offence under this section". I am fortified in my view by a comparison of the forfeiture provisions appearing in the Customs Act and the Dangerous Drugs Ordinance on proof of offence or breach of condition notwithstanding that no person may have been convicted of an offence or breach.

It is on this interpretation of the subsection that Magistrates who consider that disqualification for a period of 12 months would be harsh in any particular case invoke the provisions of section 173A Criminal Procedure Code.

The offence is no doubt a serious one and from my experience, Magistrates have imposed very heavy

A fines in respect of such offences and even imposed a disqualification of more than 12 months but for the purpose of this appeal the only question is whether the Magistrate's order is lawful or not. I am inclined to think that it is.

This view, however, is in direct conflict with the Court of Appeal decision in *Chan Tak Sang v. Public Prosecutor*⁽²⁾ where it was held at page 257:

"The intention of this regulation appears to be that every person who is found to have acted in contravention of the regulation, whether convicted thereof or not, shall automatically be disqualified for a period of twelve months."

The court was dealing with Regulation 3(2) of the Motor Vehicles (Third Party Risks) Regulations, 1946 but the provisions of that regulations are *in pari materia* with section 74(2) of the Road Traffic Ordinance. As a decision of the Court of Appeal is binding on all courts subordinate to it, it must be followed until otherwise altered by the Federal Court.

I would accordingly hold that:

- (i) The Magistrate in the exercise of judicial discretion has the power to make an order under section 173A Criminal Procedure Code for a contravention of section 74 of the Road Traffic Ordinance; and
- (ii) On the authority of *Chan Tak Sang v. Public Prosecutor*, *supra*, whether the offender is convicted or not there is no necessity for the court to order disqualification for a period of twelve months since such disqualification is automatic.

For these reasons I would dismiss the appeal.

Appeal dismissed.

PUBLIC PROSECUTOR v. DAVID NOORDIN

[R.Cr.J. (Harun J.) October 12, 1979]

[Kuala Lumpur — Criminal Revision No. 12 of 1979]

Criminal law and Procedure — Adjournments — Application for adjournment by prosecution — Order of discharge not amounting to acquittal — Order set aside — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(g) & 254.

In this case the accused was charged with cheating. The accused was first charged on January 29, 1975 and the case was fixed for trial on September 15-17, 1975. On that day the prosecution amended the charges and as a result the case was postponed to February 5 and 6, 1976. Counsel for accused did not appear on February 5, 1976 and the trial was postponed again to August 12 and 13, 1976. On August 12, 1976 a material witness was warded in hospital, having been involved in a motor accident and the hearing was postponed to January 17, 1977. On January 17, 1977 the prosecution said that one day was insufficient and in the event the trial was again postponed to September 22 and 23, 1977. On September 22, 1977 counsel for defence applied for an adjournment on the grounds that he was engaged in the High Court. Hearing was postponed to May 15 and 16, 1978. On May 15, 1978 the hearing was again adjourned to August 10 and 11, 1978, as the prosecuting officer said he was engaged in a part-heard case in another court. On August 10, 1978 counsel for the accused requested for a postponement as he had just been retained. Hearing was postponed to October 12 and 13, 1978. On October 12 and 13, 1978 there was a part-hearing but the hearing could not be completed and the hearing was adjourned to January 15-19, 1979. The trial could not proceed in January 1979 as the prosecuting officer was on medical leave. It was adjourned to September 24-28, 1979. When the hearing was resumed on September 24, 1979 the prosecution said it could